Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors (No 4)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–93 OF 1999
4 MARCH 2001
KAMALANATHAN RATNAM J

Civil Procedure *— Costs — Discontinuance of action — Discontinuance due to matter becoming academic — Whether each party should bear its own costs*

Civil Procedure *— Discontinuance — Leave of court — Discontinuance due to matter becoming academic — Whether discontinuance would cause injustice to defendants — Whether estoppel would arise if discontinuance were allowed*

In a previous suit, the court had granted the plaintiff an injunction to restrain the defendants from calling for an extraordinary general meeting ('EGM') (see [2000] 4 MLJ 571). The appeal to the Court of Appeal was dismissed and leave to appeal to the Federal Court was also refused. The plaintiff filed a second suit (the present suit) when the defendants intended to call for a second EGM and the court again gave a decision and made a further ruling (see [2001] 1 MLJ 472 and [2001] 5 MLJ 305). The court then proceeded to hear the full case under O 33 r 2 of the Rules of the High Court 1980 ('the RHC') and reserved judgment. In the meantime, the former Chief Justice had retired. The former Chief Justice was himself the reason why the Bar called for the EGM. The honourable judge urged the parties to settle the matter. In response, the Bar at its annual general meeting discussed the proposal and wrote to the court rejecting any settlement. The plaintiff informed the court that it wished to seek leave of the court to discontinue the present suit under O 21 r 3 of the RHC. The issues for determination were: (i) whether the plaintiff ought to be granted leave to discontinue the present suit, and whether by allowing the discontinuance, injustice would be caused to the defendants; (ii) whether by allowing the discontinuance, the defendants would be estopped and deprived of the right to test the principles laid down in the earlier issues; and (iii) who should bear the costs of the present suit.

Held, allowing the plaintiff's application for leave to discontinue with no right to refile and each party to meet its own costs:

(1) The plaintiff's application for leave to discontinue the present suit would not cause injustice to the defendants. The justice that the defendants were referring to would not affect the defendants in the present suit. In all the issues reported, the defendants had failed. When even the highest court in the land had shut its doors to the defendants, the defendants could not say they were deprived of justice if the plaintiff were allowed to discontinue the present suit (see p 175A).

(2) There would not be any injustice caused to the defendants as there was no ulterior motive to obtain any collateral advantage by the plaintiff discontinuing the action. Furthermore, it was the plaintiff who had succeeded all the way and there was therefore no question of any advantage that he had which he had no right to hold on to (see pp 175H, 176A–B).

(3) There was nothing to prevent the defendants from proceeding with the second EGM if they were minded to since the earlier decision granting the injunction related to the grant of an interim injunction only. So, there was no fear even of estoppel tying down the defendants (see p 176D–E).

(4) Once a matter becomes academic it is against public interest to force parties to litigate purely because the opposer to the discontinuance might get his costs. Therefore once a matter is seen to be academic the question is whether the defendant is entitled to costs. In the present suit, the interest of the parties would be served if the court make an order for each party to meet its own costs (see pp 177D–E, 178B).

[**Bahasa Malaysia summary**

Dalam satu guaman yang lalu, mahkamah telah memberikan plaintif satu injunksi untuk menghalang defendan-defendan daripada mengadakan satu mesyuarat agung luarbiasa ('MAL') (lihat [2000] 4 MLJ 571). Rayuan kepada Mahkamah Rayuan telah ditolak dan kebenaran untuk merayu kepada Mahkamah Persekutuan juga ditolak. Plaintif memfailkan guaman kedua (guaman ini) apabila defendan-defendan berniat mengadakan MAL kedua dan mahkamah sekali lagi memberikan satu keputusan dan arahan lanjutan (lihat [2001] 1 MLJ 472 dan [2001] 5 MLJ 305). Mahkamah kemudiannya mula membicarakan kes penuh di bawah A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan menangguhkan penghakiman. Sementara itu, bekas Ketua Hakim telah bersara. Bekas Ketua Hakim Negara sendirilah yang merupakan sebab mengapa Majlis Peguam ingin mengadakan MAL. Hakim yang arif telah mendesak pihak-pihak menyelesaikan perkara tersebut. Sebagai balasan, Majlis Peguam dalam mesyuarat agungnya telah membincangkan cadangan tersebut dan menulis kepada mahkamah menolak apa-apa penyelesaian. Plaintif memaklumkan mahkamah bahawa ia ingin mendapatkan kebenaran mahkamah untuk memberhentikan guaman ini di bawah A 21 k 3 KMT. Isu-isu untuk diputuskan adalah: (i) sama ada plaintif patut diberi kebenaran memberhentikan guaman ini, dan sama ada dengan membenarkan pemberhentian tersebut, ia akan mengakibatkan ketidakadilan terhadap defendan-defendan; (ii) sama ada dengan membenarkan pemberhentian, defendan-defendan akan diestop dan dirampas hak menguji prinsip-prinsip yang terkandung dalam isu-isu yang lebih awal; dan (iii) siapa yang patut menanggung kos guaman ini.

Diputuskan, membenarkan permohonan plaintif untuk kebenaran memberhentikan guaman tanpa hak pemfailan semula and setiap pihak menanggung kosnya sendiri:

(1) Permohonan plaintif untuk kebenaran memberhentikan guaman ini tidak akan mengakibatkan ketidakadilan terhadap defendan-defendan. Keadilan yang dirujuk oleh defendan-defendan tidak akan menjejaskan defendan-defendan dalam guaman ini. Dalam semua perkara yang dilaporkan, defendan-defendan telah gagal. Apabila mahkamah yang tertinggi di negara ini telah menutup pintunya terhadap defendan-defendan, defendan-defendan tidak boleh mengatakan bahawa mereka telah dinafikan keadilan jika plaintif dibenarkan memberhentikan guaman ini (lihat ms 175A).

(2) Tidak akan terdapat apa-apa ketidakadilan terhadap defendan-defendan kerana tiada apa-apa niat tersembunyi untuk mendapatkan apa-apa kelebihan sampingan dari tindakan plaintif memberhentikan guaman. Lagipun, plaintiflah yang selama ini berjaya dan oleh itu tiada soal mengenai kelebihan yang beliau tidak berhak mengekalkan (lihat ms 175H, 176A–B).

(3) Tidak terdapat apa-apa untuk menghalang defendan-defendan daripada memulakan MAL kedua jika mereka berniat berbuat demikian kerana keputusan yang lebih awal yang membenarkan injunksi tersebut berkaitan dengan kebenaran satu injunksi interim sahaja. Oleh itu, tidak perlu dikhuatiri bahawa estoppel akan mengikat defendan-defendan (lihat ms 176D–E).

(4) Sebaik sahaja sesuatu perkara itu menjadi akademik, ia menentang kepentingan awam untuk memaksa pihak-pihak untuk meneruskan litigasi hanya kerana penentang pemberhentian tersebut mungkin akan memperolehi kos. Oleh itu, sekiranya satu perkara dianggap akademik, soalnya ialah sama ada defendan-defendan berhak mendapatkan kos. Dalam guaman ini, kepentingan pihak-pihak akan terpelihara jika mahkamah memberi perintah agar setiap pihak menanggung kos mereka masing-masing (lihat ms 177D–E, 178B).]

Notes

For cases on discontinuance, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1560–1568.

For cases on costs upon discontinuance of action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1222–1224.

Cases referred to

Barretts & Baird (Wholesale) Ltd v IPCS (unreported) NLJ 16 December 1988 (refd)

Castanho v Brown & Root Ltd [1981] AC 557 (refd)

Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors [1992] 1 MLJ 51 (refd)
R v Liverpool City Council; ex p Newman reported on 13 July 1992 QBD (refd)
Raja Segaran a/l Krishnan v Bar Council Malaysia & Ors [2000] 4 MLJ 571 (refd)
Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors (No 2) [2001] 1 MLJ 472 (refd)
Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors (*No 3*) [2001] 5 MLJ 305 (refd)
Stahlschmidt v Walford (1878–79) 4 QBD 217 (refd)
Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Ors [1997] 3 MLJ 333 (refd)

Legislation referred to

Rules of the High Court 1980 O 21 rr 2(1), 3(1), O 33 r 2

DP Vijandran (*Raja Segaran & Associates*) for the plaintiff.
Raja Aziz Addruse (*Malik Imtiaz Ahmed bin Ghulam Sarwar, Gopal Sreenevasan* and *Michele N Kaur* with him) (*Sivananthan*) for the defendants.

Kamalanathan Ratnam J:

Facts

The facts leading to the dispute between the parties have been set out in my earlier decisions. In *Raja Segaran a/l Krishnan v Bar Council Malaysia & Ors* [2000] 4 MLJ 571, the plaintiff raised almost identical issues. The court had granted the plaintiff an injunction to restrain the defendants from calling for an extraordinary general meeting ('EGM'). The appeal to the Court of Appeal was dismissed and leave to appeal to the Federal Court was also refused. The matter thus ended there. Since the defendants intended to call for a second EGM, the plaintiff filed a second suit (the present suit). This court again gave a decision (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors (No 2)* [2001] 1 MLJ 472). In the course of the proceedings this court made a further ruling (see *Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors* (*No 3*) [2001] 5 MLJ 305). The court then proceeded to hear the full case under O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). Parties had made their very lengthy submissions and volumes of authorities were cited and this court then reserved judgment. In the meantime the former Chief Justice, Tun Dato' Seri Mohd Eusoff bin Chin, had retired. The new Chief Justice, YAA Tan Sri Mohamed Dzaiddin bin Haji Abdullah, on taking office urged all parties, namely the Bench and the Bar, to reunite and to forge ahead into the new millennium on a friendlier basis. It was a known fact that during the tenure of the former Chief Justice the relationship between the Bench and the Bar was far from cordial and that the former Chief Justice was himself the reason why the Bar had called for the EGM. In the light of this new fresh breadth of reconciliation emerging from the new Chief Justice's chambers and

wafting through the corridors of justice, I took the cue and called both parties to appear before me on 10 March 2001 when I read out the following statement:

Gentlemen of the Bar,

In so far as this case is concerned I have already reached a decision. All it requires is for me to tell you my decision and in the event of an appeal to write my judgment. But before I pronounce my decision I take this opportunity to appeal to both sides to reconsider your positions. In addressing the plaintiff I would urge you to consider the fact that whilst you might have been motivated by the highest of ideals for having filed this suit, you must be aware that subsequent events have so quickly overtaken your desired aims that they now seem superfluous. Let's face it. The *raison d'etre* for your filing this suit, namely the allegations against YAA Tun Eusoff bin Chin, the former Chief Justice of Malaysia, is no longer an issue as he has since retired. Any perseverance of this goal is now an exercise in futility. Let bygones be bygones.

On this score, it must be noted that the present Chief Justice, YAA Tan Sri Mohamed Dzaiddin bin Hj Abdullah, the Minister in the Prime Minister's Department, YB Dato' Dr Rais Yatim, the President of the Bar Council, Tuan Hj Sulaiman bin Abdullah, have all voiced their hope that the new millennium will bring about a change. The joint effort of these three personalities must not go to waste. I now make this impassioned plea to both parties to hang up your gloves and enter the ring of peace.

The whole country is reverberating with the sound of the word 'unity'. It is axiomatic therefore that the Bar ought to lead by example. When I say the Bar, I include the plaintiff herein. Just about a year ago I was to hear the defamation suit filed by Mohammad Sabu (the then MP for Party PAS) and Ibrahim Ali from UMNO, regarding a reference made by the latter in respect of a khalwat case. On the day fixed for hearing, and with the consent of both solicitors I talked with the plaintiff and the defendant and urged them to show the nation that notwithstanding their different ideologies, they stood united as a race. The parties asked for a short adjournment and returned within half an hour to inform me that for the sake of Malay unity the plaintiff was withdrawing his suit with no order as to costs. It was a spontaneous show of respect for each other which no doubt the media had then canvassed.

Then I had the occasion to hear yet another defamation suit whereby Mr Lim Kit Siang, the DAP stalwart and its former MP, sued YB Dato' Seri Dr Lim Keng Yaik, the Minister for Primary Industries. Again on the morning of the hearing and with the consent of counsel for both parties, which included Mr Karpal Singh for Mr Lim Kit Siang, I spoke to both litigants of the need to show the country that the Lims were willing to forgive and forget and to show the nation that for the sake of the community they were united. I was a happy judge to have recorded a withdrawal of the suit with no order as to costs. The magnanimity of Mr Lim Kit Siang and the equal show of respect by the Minister were exemplary.

Yet again, the secretary of the Malay Badminton Association of Malaysia (MBAM) sued four officers of its State branches in defamation. During one of the case management dates I was able to persuade both

counsels to speak to their respective clients whether they were prepared to meet with the judge to resolve the matter. The said secretary had sued the president of the Penang branch of the MBAM and another official, the secretary of the Negeri Sembilan MBAM, and the secretary of the Kelantan branch. Having fixed a convenient date to enable all parties to travel to Kuala Lumpur I was extremely pleased when after a short adjournment, the parties announced that the matter was settled in the interest of 'Malay unity' (see *The Sun* / Saturday / 2 September 2000 at p 6).

I am therefore now appealing to you, gentlemen of the Bar, to show this nation and the world that you are willing to forgive and forget. You, the plaintiff, have won decisively the earlier suit and the decision of the High Court has been affirmed by the Court of Appeal and I understand that leave to appeal to the Federal Court had been refused. I understand you were awarded generous costs all the way. I now ask you to show magnanimity in victory by giving up all costs awarded to you so far. I also ask that as a further show of your desire to put an end to this long drawn out trial, you would deem it fit to withdraw all existing suits against the Bar and the related parties.

You, the Bar, I ask that you do not let your fear of what has been decided by the courts as against you, to come in between a settlement. Do not reject the olive branch when offered. Do not think that your rights have been curtailed by the judgment of this court and the Court of Appeal and do not be tempted to use this case to resurrect the same issues. Be mindful too of the fact that in the event the highest court reaffirms the earlier decision in respect of the other case already decided, your doors to settlement would forever be shut. Instead let the matter rest. If, God forbid, there be another occasion for you to challenge the earlier decision, then so be it. But today, I urge you, be gracious in accepting the hand of friendship offered by the plaintiff. Accept him, if you will, as the return of the prodigal son. Forgive him for the anguish and acrimony that have been caused.

I urge all parties to join hands to show this nation and to the world that united we stand and divided we fall. Enemies of the nation are ramming the portal gates of freedom. Let not the citizens be disunited. You the members of the Bar are the legal brains of the country. Your reasoning, tempered with patience, your understanding, laced with tolerance, must be the hallmark of your very own existence. You cannot be vindictive. You cannot set personal goals. You must act to benefit the nation.

At a time when this country faces turmoil and tribulation both from within and without, the people look to you, the members of the Bar, for guidance. Be moderate, considerate, compassionate. May God bless you both in your deliberations.

Thank you.

In response to my plea, the Bar at its annual general meeting discussed the proposal and wrote to the court rejecting any settlement. The plaintiff in the meantime wrote a letter to the court indicating that he wished to respond to the court's plea. By consent, I fixed 20 April 2001 for both parties to appear.

On that date, Mr DP Vijandran appeared for the plaintiff with En Malik Imtiaz appearing for the defendants. At the outset, I indicated to both parties that both their presence that day was not at the court's directive. It was at the request of the plaintiff to which the defendants responded. Mr DP Vijandran confirmed that their appearance before me that day was at his client's request. Mr DP Vijandran then with the court's consent proceeded to read from a prepared text. The same is reproduced herewith:

> *Statement of plaintiff in response to Statement of this Honourable Court on 10 March 2001*
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> On 10 March 2001, your Lordship made a statement to both parties wherein your Lordship proposed that the parties should seek some amicable settlement on this matter. Your Lordship set out a number of points for both parties to reflect upon.
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> Your Lordship then left it to the parties to pursue the matter further.
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> Two days ago we received a copy of a fax sent by Messrs Sivananthan on behalf of the defendants. Their letter states that your Lordship's proposal was discussed by the Malaysian Bar at its annual general meeting on 17 March 2001 and it was decided that settling this matter was out of question.
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> Regardless of the Bar's position on this matter, the plaintiff has given serious and positive consideration to the further conduct of this matter and wishes to state his conclusions thereon.
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> Your Lordship in your statement adverted to the plaintiff's motivation in filing this suit. We wish to reiterate what we have said so many times during the various levels of hearing of this matter as to why the plaintiff filed this action.
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> It was and still is our belief that the administration of justice is best served if there is a harmonious relationship between the Bench and the Bar. If there is a public war between the Bench and the Bar, the resulting attrition affects the system of justice and practising lawyers. It was therefore the plaintiff's belief that the Bar's proposal to pass a resolution that amounted to contempt of court was an assault on the judiciary as a whole that would subvert good relations between the Bench and the Bar.
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> Accordingly, the plaintiff wrote to the Bar pleading that they do not proceed with the resolution. When the Bar refused to desist, the plaintiff filed the suit herein.
>
> That was then.
>
> Today, however, the malignant miasma of mutual aversion and attrition between the Bench and the Bar is no more. There is now a new dimension in Bench/Bar relations. It would not be putting it too high if I said that presently the amity and cordiality between the Bench and Bar are at an all time high. This is a most welcome development; indeed a consummation devoutly to be wished.
>
> The plaintiff's suit, which was highly necessary, when relations between the Bench and Bar were bad becomes irrelevant academic and/or redundant when the relations are good. In fact the continuation of this suit may be inimical to relations between the Bench and the Bar, which is far from what the plaintiff originally intended. From the plaintiff's point of view, the suit he has filed is no longer meaningful and may in the current state of cordiality be

even counter-productive. He has therefore come to the conclusion that he no longer wishes to proceed with this action.

There is one other factor, though it is not a determining or crucial factor. The plaintiff who currently holds a Masters Degree has been accepted to read for a Doctorate in Law at the University of Strathclyde at Glasgow, United Kingdom, and will be leaving to pursue his studies very shortly. He does not wish to leave this suit hanging whilst he is away.

We therefore wish to make an end.

This has not been an easy decision. Among other problems, we had to resist the seductive lure of pursuing the nice points of law that this case has thrown up.

There are times in the career of a lawyer when forgetting the niceties of the laws, the arts of oratory and the pursuit of intellectual butterflies, he turns to the judges and speaks to them from the heart, mindful of a greater good that surpasses ordinary and circumscribed interests. At such times justice is truly reborn and he feels the soulful tremor of sincerity in his voice.

This is such a time.

We find comfort in the hope that the plaintiff's decision will contribute to and enhance the precious amity that now so warmly suffuses the Bench and the Bar.

To effectuate the foregoing sentiments, we hereby apply now to your Lordship for leave to discontinue this action under O 21 r 3.

We therefore apply today to your Lordship for leave to discontinue this action under O 21 r 3.
Sgd
DP Vijandran
Counsel for the plaintiff

After Mr Vijandran had finished, En Malik sought a short adjournment to confer with Mr Mah Weng Kwai, the present chairman of the Bar Council, who was present in court. The defendants then requested more time to respond. I then fixed for continuation to 27 April 2001.

Findings of the court

On that day, YM Raja Aziz Addruse appeared with En Malik Imtiaz. Mr Vijandran then informed the court that whilst on the previous occasion he had made an oral application to discontinue, in order to formalize the matter, he had filed a written application with a supporting affidavit to which the defendants had responded with an affidavit served on him that morning. However, as he did not want any further adjournments and as he did not wish to reply, he merely wished to have it recorded that he was disputing the contents of the said affidavit and on that score wished to proceed.

YM Raja Aziz in his submission referred the court to O 21 r 3(1) of the RHC which reads as follows:

(1) Except as provided by r 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular

> claim made by him therein, without the leave of the court, and the court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

Referring to the last few words 'or otherwise as it thinks just' he pointed out that such words were not present in O 21 r 2(1) of the RHC which reads as follows:

> (1) The plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

He then argued that even under r 2(1) where no leave was required for discontinuance, the notice of discontinuance could be set aside, if the discontinuance was, in the view of the court an abuse of process. In support he relied on *Stahlschmidt v Walford* (1878–79) 4 QBD 217. In that case, after an action had been referred to an arbitrator to state a special case, and the court had in the case found the facts with regard to all but a very small portion of the claim in the defendants' favour, and when the plaintiff applied to discontinue, the court refused him leave to do so. Counsel urged me to consider justice as a main ground to refuse the plaintiff in this case the right to withdraw this suit. Mr Vijandran, on the other hand, pointed out that as in *Walford* if the defendant had won on various prior issues then following the principle in *Walford* it would be wrong for the plaintiff to take advantage of his right to withdraw by discontinuing, since he knows that many issues had already been decided in the defendant's favour. But in this case, Mr Vijandran pointed out that all issues had been decided in the plaintiff's favour; not only that, the Court of Appeal had upheld the decision in the plaintiff's favour and the highest court in the land had refused leave to appeal. On this point I agree with the plaintiff. In *Walford*, Cockburn CJ said at p 219 as follows:

> … It appears to me that the hearing before the arbitrator, and his finding, were substantially equivalent to a trial at *nisi prius* and the verdict of a jury. The defendant, as it seems to me, is in justice entitled to the fruits of these proceedings, and we ought not to interfere to deprive him of them. Admitting that it is a matter of discretion under O XXIII r 1, whether the plaintiff shall be allowed to discontinue, under the circumstances of this case, I think, as a matter of discretion, that the plaintiff ought not to be allowed to discontinue.

Echoing the same sentiments, Mellor J also said at the same page as follows:

> … But the discretion thus given must be exercised within certain limitations, and so as not to take away from the defendant any advantage to which he is fairly and reasonably entitled. It seems to me that to allow the plaintiff to discontinue under the circumstances of the present case would be to deprive the defendant of what is justly his right.

To my mind, the justice that YM Raja Aziz was referring to would not affect the defendants in this case. In all the issues reported, the defendant had failed. When even the highest court in the land had shut its door to the defendants, the defendants cannot say they are deprived of justice if the plaintiff is allowed to discontinue this suit.

Estoppel

YM Raja Aziz then argued that estoppel will raise its ugly head against them and that the plaintiff would be depriving the defendants of the right to test the principles laid down in the earlier issues. He urged me to consider the prejudice that would befall the defendants if the plaintiff was allowed to discontinue this suit. He then referred me to *Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51 where Lim Beng Choon J at p 63 set out the principles relating to discontinuance of an action. This is what the learned judge said:

> The principles that can be extracted from the aforementioned cases are that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if:
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> (1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v Brown & Root Ltd* [1981] AC 557;
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> (2) the discontinuance was not made bona fide by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence — see *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124;
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> (3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation — see *Covell Matthews & Partners v French Wools Ltd* [1977] 2 All ER 591.

In reply Mr Vijandran pointed out that in *Hanhyo* the plaintiff had obtained in default judgment against the second defendant and sought leave to discontinue against the first defendant who opposed the said discontinuance. The learned judge whilst agreeing that the plaintiff ought to have applied for leave before discontinuing, granted the leave and allowed the discontinuance on terms. The court agreed that it was futile to proceed against the first defendant since the plaintiff had already obtained judgment against the second defendant and intended to execute against the second defendant. Referring to the principles distilled by Lim Beng Choon J in *Hanhyo* as to when discontinuance ought to be frowned upon, Mr Vijandran argued that there was no ulterior motive to obtain any collateral advantage by the plaintiff discontinuing this action. Again I agree. In the case of *Castanho v Brown & Root Ltd* [1981] AC 557 relied on by Lim Beng Choon J, the plaintiff, a Portuguese subject who was severely injured in an accident on board an American ship lying in an English port, sued the defendants in England. He obtained an admission of liability and two interim payments. He then realized that he could get much more by way of damages if he filed the suit in America. He thus filed a notice of

discontinuance with the ulterior motive of obtaining a collateral advantage by filing in America. Although the House of Lords agreed that the notice of discontinuance ought to be struck out, yet it allowed the plaintiff to proceed to file the suit in America. I cannot see how, by discontinuing this action the plaintiff would obtain any collateral advantage. As for the second and third principles which ought to be taken together, it is a fact that it is the plaintiff who had succeeded, as conceded by YM Raja Aziz, all the way. There is therefore no question of any advantage that he has which he has no right to hold on to.

In the course of his submission, YM Raja Aziz, a very senior member and whom I might call the doyen of the Bar, expressed the view of the Bar as follows:

> The call for the EGM was to uphold the integrity of the judiciary and the Bar will continue to take that stand and will continue to uphold that position notwithstanding there is a better relationship between the Bench and the Bar.

I am certain that YM Raja Aziz clearly must have had in mind the fact that notwithstanding the earlier injunction given in the earlier suit, and the very fact that the plaintiff had to file a second suit as the defendants were intending to hold another EGM for the same purpose that they intended when calling for the first EGM, there is nothing to prevent the defendants from proceeding if they are minded to, since the earlier decision granting the injunction related to the grant of an interim injunction only. I had in fact made this very clear repeatedly to En Malik Imtiaz in the course of his lengthy submission during the trial stage. So there is no fear even of estoppel tying down the defendants.

It is clear to me that the continuation of this suit is mere academic rhetoric since the former Chief Justice has retired. Is there a need now for the suit to continue? Relationship between the Bench and Bar is at its all-time high. I am satisfied that this is the right moment to let wounds heal. Even at the Bar's annual dinner where only selected judges were invited, the learned Chief Justice, in his post-prandial speech asked for the healing process to take its course and for closing of ranks, to jointly tackle the task of dispensing justice. And so shall it be. I therefore allow the plaintiff to discontinue this suit with no right to refile. This suit therefore stands dismissed.

Costs

On the issue of costs, Mr Vijandran referred me to *Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Ors* [1997] 3 MLJ 333, where the court held that it is not necessarily so that a plaintiff who withdrew an action must, as a matter of course, pay the costs of the action. The court must assess the situation to see why the action was withdrawn. The learned judge decided to follow the decision in *Barretts & Baird (Wholesale) Ltd v IPCS* (unreported) NLJ 16 December 1988. I have had the benefit of reading *Barretts & Baird*. At p 4, Henry J said as follows:

The defendants make different use of the notes in the Supreme Court Practice and they refer me to what they contend to be the general rule and they refer me to footnote 62/3/8 which deals with *Stratford v Lindley* and the situation where the original order was costs in cause, and having dealt with *Stratford v Lindley* concludes in these words:

> 'Nevertheless, if a plaintiff discontinues the general rule is that costs in cause are the defendant's, …'

and they say that that general rule should be applied here.

> Now in most cases of discontinuance, that may well be just, because in most cases of discontinuance, discontinuance equals defeat, effectively, or the acknowledgement of a defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now become academic save for the question of costs.
>
> In those circumstances, where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply where the discontinuance can safely be equated with defeat or the acknowledgement of likely defeat.

I agree with these views. Once a matter becomes academic it is against public interest to force parties to litigate purely because the opposer to the discontinuance might get his costs. Again purely on the basis that it is academic or quasi-academic, parties might urge the court to continue to litigate, with the collateral motive of seeking costs. Therefore once a matter is seen to be academic the question is whether the defendant is entitled to costs.

In *R v Liverpool City Council; ex p Newman* reported on 13 July 1992 QBD, Simon Brown LJ said as follows:

> The position is, however, entirely different where, as here, the discontinuance follows some step which has rendered the challenge no longer necessary, which in other words renders the proceedings academic. That may have been brought about for a number of reasons. If, for instance, it has been brought about because the respondent, recognizing the high likelihood of the challenge against him succeeding, has pre-empted his failure in the proceedings by doing that which the challenge is designed to achieve — even if perhaps no more than agreeing to take a fresh decision — it may well be just that he should not merely fail to recover his own costs but indeed pay the applicant's.
>
> On the other hand, it may be that the challenge has become academic merely through respondent sensibly deciding to short-circuit the proceedings, to avoid their expense or inconvenience or uncertainty without in any way accepting the likelihood of their succeeding against him. He should not be deterred from such a cause by the thought that he would then be liable for the applicant's costs. Rather in those circumstances, it would seem to me appropriate that the costs should lie where they fall and there should accordingly be no order. That might equally be the case if some action wholly independent of the parties had rendered the outcome of the challenge academic. It would seldom be the case that on discontinuance this court would think it necessary or appropriate to investigate in depth the substantive

merits of what had become an academic challenge. That ordinarily would be a gross misuse of this court's time and further burden its already over-full list.

It is clear from a study of these authorities that the procedure for obtaining leave to discontinue enables a party to bring to an end his litigation when he has already obtained what he had sought to obtain.

After Mr Vijandran has extensively addressed the court on the issue of costs, I invited YM Raja Aziz to address me in reply since he had in his submission not touched on the question of costs. Since YM Raja Aziz said in reply that he had nothing to say, I took it to mean that he left the issue of costs for the court to decide. I am therefore of the view that the interest of the parties would be served if I make an order for each party to meet its own costs.

Plaintiff's application for leave to discontinue allowed.

Reported by Moy Saw Han